NO. 42255-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Appellant,

v.

R.M.-S.,

Respondent,

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PACIFIC COUNTY, JUVENILE
DIVISION

The Honorable Michael J. Sullivan, Judge

BRIEF OF RESPONDENT

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A. ISSUES IN RESPONSE

1. Where a capacity hearing is required, trial courts have no authority to act in a case until capacity has been determined. That determination must be made within 14 days of the respondent's first appearance. If that deadline passes without a hearing, the State must show "excusable neglect" to obtain an extension. Where the State missed the deadline in this case and failed to demonstrate excusable neglect, did the trial court properly dismiss the case?

2. CrR 8.3(b) authorizes a trial court to dismiss a case where prosecutorial mismanagement prejudices the respondent's right to a fair trial. Is the dismissal in this case also warranted under CrR 8.3(b) where the defense demonstrated both mismanagement and prejudice?

B. STATEMENT OF THE CASE

On April 7, 2011, the Pacific County Prosecutor's Office charged R.M.-S. with one count of Contempt of Court for several unexcused absences at school. CP 1-2. R.M.-S. had turned 11 years old just three weeks earlier. CP 1. R.M.-S. made his first appearance in court on April 15, 2011, and was permitted to remain out of custody. CP 6, 15-19. The State did not move under JuCR 7.6(e) for a capacity determination or move for an extension of the

14-day deadline for such a determination.

R.M.-S. was arraigned on May 3, 2011. RP 2-3. J. Wayne Leonard, a juvenile court administrator, noted that a capacity hearing was mandatory and suggested – based on a conversation with counsel[1] – the hearing could be set for the same day as trial. RP 3-4. The court set both matters for June 9, 2011, which was a "juvenile offender docket day." RP 3-4; CP 7.

When the parties appeared on June 9, defense counsel moved to dismiss the charge based on the State's failure to move for a competency hearing and failure to ensure such a hearing was held within 14 days of R.M.-S.'s first appearance. RP 3-4. The prosecution opposed the motion, arguing the defense had not established any prejudice to R.M.-S.' rights. RP 5-6, 11. The prosecution also argued the issue had been waived by defense counsel's failure to object earlier to the untimely setting. RP 18.

Defense counsel argued there was no need to establish prejudice because without a timely capacity finding, the trial court simply had no authority to take any action in the case beyond dismissing the charge. RP 6-9. Moreover, the issue was not

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[1] Leonard did not identify "counsel" as counsel for the prosecution or counsel for the State.

waived because by the time it was first discussed on May 3, the 14-day deadline had already passed, and the defense had no obligation to lodge an earlier objection where R.M.-S. was presumed without capacity to commit a crime and the State had not even bothered to file a capacity motion. RP 14-17.

In addition to seeking dismissal under JuCR 7.6(e), defense counsel argued dismissal was appropriate under CrR 8.3(b) for prosecutorial mismanagement. Defense counsel explained that R.M.-S.' case was one in a long line of cases where the Pacific County Prosecutor's Office had failed to comply with time limitations in the court rules. RP 23-25. The court agreed there had been prosecutorial mismanagement. RP 27.

Counsel argued this mismanagement had prejudiced his ability to prepare R.M.-S.'s trial defense. Specifically, there was only one juvenile docket day scheduled per month and, assuming R.M.-S. were found to have capacity, trial would still have to be specially set within the speedy trial deadline. In light of counsel's schedule, it was not apparent he could adequately prepare within that time frame. RP 28-29. The court agreed R.M.-S. had been prejudiced and dismissed the criminal charge under CrR 8.3(b). RP 30-33; CP 14.

The State has appealed this dismissal.

C. ARGUMENT IN RESPONSE

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO DISMISS THE CHARGE AGAINST R.M.-S.

RCW 9A.04.050 provides:

> Children under the age of eight years are incapable of committing crime. Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong. Whenever in legal proceedings it becomes necessary to determine the age of a child, he or she may be produced for inspection, to enable the court or jury to determine the age thereby; and the court may also direct his or her examination by one or more physicians, whose opinion shall be competent evidence upon the question of his or her age.

(emphasis added). The State bears the burden of proving capacity by clear, cogent, and convincing evidence. State v. Q.D., 102 Wn.2d 19, 24-26, 685 P.2d 557 (1984).

JuCR 7.6(e) indicates that, "When a determination of capacity is required pursuant to RCW 9A.04.050, a hearing to determine the juvenile's capacity shall be held within 14 days from the juvenile's first court appearance, separate from and prior to arraignment."

Thus, under the statute, interpretive case law, and court rule, R.M.-S. was presumed incapable of committing a crime unless and

until the State proved by clear and convincing evidence that he had the capacity to understand the charged act and know it was wrong. Moreover, the State had to make this showing within 14 days of R.M-S.'s first appearance on April 15, 2011, meaning the deadline was April 29, 2011. The State failed to meet that deadline and now asks this Court to find that there is no consequence.

1. The Defense Objection Was Not Waived.

Attempting an analogy to CrR 3.3, the State first argues that the defense waived the violation of JuCR 7.6(e) when it failed to object to the absence of a capacity hearing within 14 days of R.M-S.' initial appearance. See Brief of Appellant, at 8-10. This analogy fails.

CrR 3.3 contains a strict waiver provision: where the trial date is set outside the time limits for trial, a defendant's failure – within 10 days of receiving notice of the trial date – to object and move the court to reset the trial date within speedy trial time limits results in the waiver of any objection. CrR 3.3(d)(3). JuCR 7.6(e) contains no similar provision.

When interpreting court rules, this Court treats the rules as though the Legislature had enacted them and applies principles of statutory construction. State v. Greenwood, 120 Wn.2d 585, 592,

845 P.2d 971 (1993). "It is well settled that where the Legislature uses certain language in one instance but different, dissimilar language in another, a difference in legislative intent is presumed." Millay v. Cam, 135 Wn.2d 193, 202, 955 P.2d 791 (1998). Moreover, omissions are deemed intentional. Words and clauses will not be added. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

CrR 3.3 demonstrates that when our Supreme Court wishes to impose a strict waiver provision in a court rule, it knows how to do so. The Supreme Court omitted a similar provision in JuCR 7.6(e) by design, and this Court should reject the State's attempt to rewrite the rule.

It is the State's burden to seek a timely capacity determination. The defendant's failure to object where the State does not file a motion to determine capacity, does not schedule a hearing, and does make any effort whatsoever to ensure compliance with the unambiguous time limitation in JuCR 7.6 does not waive this burden.

2. Dismissal Was Warranted.

The trial court relied on CrR 8.3(b) in dismissing the charge against R.M.-S. As will be discussed, CrR 8.3 did indeed authorize

the court to dismiss under the circumstances of this case. But this Court can also affirm on any grounds supported by the record. State v. Huynh, 107 Wn. App. 68, 74, 26 P.3d 290 (2001). And even without looking to CrR 8.3(b), the court's decision was justified.

In State v. B.P.M., 97 Wn. App. 294, 982 P.2d 1208 (1999), the State failed to ensure capacity hearings were held within the 14-day limit in two separate cases. In each instance, the trial court refused to consider the State's request for a continuance and dismissed the case based on a perceived lack of jurisdiction. The State appealed. Id. at 296-297.

Division One found that a violation of JuCR 7.6(e) did not divest the trial court of jurisdiction, either subject matter or personal. Thus, the trial courts erred when they found otherwise. Id. at 297-299. But this did not mean there were no consequences to a violation. The Court noted that JuCR 7.6 was subject to Civil Rule 6(b), which affords trial courts discretion to enlarge the time to accomplish an act where there is good cause for doing so:

> the court for cause shown may at any time in its discretion, (1) with or without motion or notice, order the period enlarged if request therefore is made before expiration of the period originally prescribed or as extended by a previous order or, (2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was

the result of excusable neglect . . . .

CR 6(b); B.P.M., 97 Wn. App. at 300.

Notably, in reversing the orders of dismissal and remanding the cases back to the trial courts, the Court of Appeals indicated, "the trial courts should determine whether the State has shown cause to enlarge the 14-day period and, if so, whether the rights of these juveniles have been materially prejudiced." B.P.M., 97 Wn. App. at 301 (emphasis added). In other words, if the trial courts determined there was not cause to enlarge the 14-day mandatory period, the cases would be dismissed. Only if there was good cause to enlarge the period would the issue of prejudice arise. Compare State v. Gilman, 105 Wn. App. 366, 367-369, 19 P.3d 1116 (where State violated JuCR 7.6(e) by not ensuring hearing within 14 days, matter remanded to determine resulting prejudice where parties agreed that was proper course), review denied, 144 Wn.2d 1011 (2001).

In R.M.-S.'s case, the trial court did not need to reach the issue of prejudice because the State could not show cause for an extension of the 14-day deadline. The State never even moved for such an extension. But had it done so on June 9 or even May 3, that motion would have been denied. Because such a motion would have been untimely, the State would have had to demonstrate

"excusable neglect." CR 6(b)(2); see also Willapa Trading Co. v. Muscanto, Inc., 45 Wn. App. 779, 785, 727 P.2d 687 (1986) (no party has an absolute right to a continuance; the denial of a continuance is reversible only for an abuse of discretion).

There is nothing in this record suggesting, much less demonstrating, excusable neglect. Instead, it appears the deputy prosecutor did not know about the time limitation or did not take the limitation seriously. In the absence of an extension, and therefore the absence of a capacity hearing, the trial court had no authority to do anything beyond dismissing the charge, which is precisely what it did. See State v. Golden, 112 Wn. App. 68, 77, 47 P.3d 587 (2002), review denied, 148 Wn.2d 1005 (2003).

The criminal charge also was properly dismissed under CrR 8.3(b), which provides:

> The court, in the furtherance of justice, after notice and a hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

The rule does not require evil or dishonest actions; simple mismanagement, coupled with resulting prejudice that affects the right to fair trial, will suffice. A decision under CrR 8.3(b) is reviewed

for an abuse of discretion. State v. Garza, 99 Wn. App. 291, 295, 994 P.2d 868, review denied, 141 Wn.2d 1014 (2000).

In R.M.-S.'s case, the court properly found prosecutorial mismanagement. RP 27. In its brief, the State faults *the trial court* for not ensuring the requisite hearing was held by the deadline, noting it is the court's duty to set hearing dates. Brief of Appellant, at 11-12. But it is the State's burden to overcome the presumption of incapacity. Q.D., 102 Wn.2d at 24-26. Therefore, it is also the State's burden to move for the necessary hearing in time to comply with the 14-day time limit. Judges are not soothsayers. For all they know, the parties will stipulate to capacity, making a hearing unnecessary.

The court also properly found prejudice. As defense counsel explained, the failure of the prosecutor's office – generally and specifically in this case – to follow deadlines contained in the rules interfered with counsel's ability to properly and adequately prepare for trial. RP 28-29. The trial court found that defense counsel could not be ready to present a trial defense until R.M.-S.'s capacity had been determined and that the capacity hearing that day would not leave sufficient time for trial, requiring that trial be continued to sometime in the future. RP 22.

The State takes issue with this finding, arguing that counsel could have prepared simultaneously for the capacity hearing and trial because evidence from the capacity hearing "would not have adduced any additional evidence not known to respondent's counsel that would have been admissible at trial." Brief of Appellant, at 15. This is pure speculation.

Several factors are relevant in determining whether a child has legal capacity to commit the charged crime:

> (1) the nature of the crime; (2) the child's age and maturity; (3) whether the child showed a desire for secrecy; (4) whether the child admonished the victim not to tell; (5) prior conduct similar to that charged; (6) any consequences attached to the [prior] conduct; and (7) acknowledgement that the behavior was wrong and could lead to detention. . . .

J.P.S., 135 Wn.2d 34, 38-39, 954 P.2d 894 (1998); see also State v. Erika D.W., 85 Wn. App. 601, 605, 934 P.2d 704 (1997) (discussing factors). Also relevant is testimony from those acquainted with the child and the testimony of experts. J.P.S., 135 Wn.2d at 39.

Given the broad scope of these relevant factors – including prior similar conduct, admissions, and admonishments to others regarding the crime – there is always a significant risk that new evidence, not previously known to the prosecution and/or the

defense, will come to light, thereby altering the defense strategy. Therefore, as the trial court recognized, it was impossible for defense counsel to fully prepare for trial until after a capacity hearing had been conducted.

The State also argues that a simple trial continuance would have been sufficient. Brief of Appellant, at 16-17. But a continuance would not have sufficed. Defense counsel could not fully prepare for trial until after the capacity hearing, and there was not sufficient time also to have trial that day. RP 22. Trial had to be rescheduled to another date within the quickly diminishing speedy trial period and, as defense counsel explained, this interfered with his ability to adequately prepare for R.M.-S.'s trial. RP 28-29.

Because the defense demonstrated both mismanagement and resulting prejudice, the trial court did not abuse its discretion when it dismissed the charge under CrR 8.3(b).

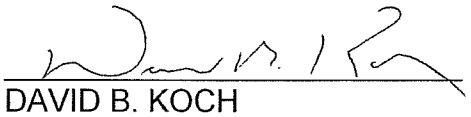
D. CONCLUSION

Whether based on the absence of good cause to extend the deadline for the capacity determination or based on prosecutorial mismanagement under CrR 8.3(b), this Court should affirm the dismissal order.

DATED this 27th day of October, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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DIVISION TWO

STATE OF WASHINGTON	)	
	)	
Appellant,	)	
	)	
vs.	)	COA NO. 42255-7-II
	)	
RAFAEL MENDOZA-SERRANO,	)	
	)	
Respondent.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF OCTOBER 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF RESPONDENT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL ROTHMAN
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[X] RAFAEL MENDOZA-SERRANO
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SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF OCTOBER 2011.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

October 27, 2011 - 4:56 PM

Transmittal Letter

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Case Name: RAFAEL MENDOZA-SERRANO

Court of Appeals Case Number: 42255-7

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Patrick P Mayavsky - Email: **mayovskyp@nwattorney.net**